Finally, we would add that the appellants had clearly and unequivocally agreed with the respondents on completion to comply with the terms and conditions of the revised offer. On a common sense construction of this undertaking, this cannot mean that the appellants were released from their undertaking when on completion one of such terms *i.e.* the liability to pay the additional premium, has not crystallised. Nor can it be said that the act of completion is a waiver of such compliance. Therefore, the appellants should not be allowed to resile from their undertaking on the basis of an argument that the respondents have suffered no loss. If necessary, this Court would allow the respondents to amend their pleadings to plead this undertaking on which an order for specific performance could be ordered.

Accordingly, we are of the view that whether the claim is based on a breach of warranty or a breach of undertaking, the damages suffered by the respondents was the amount of the additional premium and the stamp duty which Natwest was compelled to pay to the Government of Singapore for the alienation of the Yellow Parcel free from encumbrances. We agree with the decision of Chua J. that there was no basis for the appellants to resist the respondents' claim.

With regard to the order for payment of interest at 15½% per annum, we agree with counsel for the appellants that Chua J. was wrong in law in applying the rate of interest payable under Clause 7(b) or (c) to this claim. In our view, a rate of 9% p.a. from the date of payment by Natwest up to the date of judgment would be reasonable.

On the question of costs, the appellants have, under Clause 11 of the Option, agreed to indemnify and hold harmless the respondents against all claims and costs sustained by the respondents in consequence of any breach of warranty or condition by the appellants. Counsel for the appellants has submitted that Clause 11 is a normal indemnification clause designed to protect the respondents when they are sued and not when they sue. There is no substance in this submission. As the only warranties in the Option were given by the appellants, Clause 11 will perforce cover a case where the respondents sue the appellants for breach of such warranties.

In the result, this appeal is dismissed with costs to be paid by the appellants on a solicitor and client basis save that interest payable on the $545,200 and $16,364 is varied to 9% per annum from the date of their disbursement up to the date of judgment.

Order accordingly.

Solicitors: *Boey Ng Wan; Donaldson & Burkinshaw.*

TAY BENG CHUAN v. OFFICIAL RECEIVER AND LIQUIDATOR, KIE HOCK SHIPPING (1971) PTE. LTD.

[C.A. (Wee Chong Jin C.J., Lai Kew Chai & Thean JJ.) March 18, 1987]

[Singapore – Civil Appeal No. 57 of 1982]

Company Law – Director's duty – Director tried and convicted for failing to use reasonable diligence in discharge of – Trial by summary procedure – Whether trial judge erred in law – Companies Act (Cap. 185, 1970 Edn.), s. 305(1) (now s. 341(1) of Cap. 50, 1985 Edn.).

Practice and Procedure – Appeal – Circumstances under which appellate court will interfere with finding of lower court.

The respondent was the Official Receiver of Kie Hock Shipping (1971) Pte. Ltd. ("the Company") a private exempt company which was compulsorily wound up on May 27, 1978. The appellant, Tay Beng Chuan, was one of five directors of the Company. Tay Hock Gwan was the Permanent Managing Director.

On September 29, 1981, the appellant was charged and convicted for "failing to recover debts owed to (the Company) by twelve companies incorporated in the Republic of Panama ... which on December 30, 1977 amounted to $10,291,000 and which were allowed to accumulate to $11,551,000 by May 26, 1978 and thereby commit a breach of duty under section 132(1) of the Act to at all times use reasonable diligence in the discharge of the appellant's duty as a director of the Company."

On October 15, 1981, the respondent as liquidator of the Company took out an application by way of a Summons-in-Chambers in the Winding-Up proceedings against Tay Hock Gwan and the appellant pursuant to section 305 of the Companies Act (Cap. 185 1970 Edn.). Tay Hock Gwan did not contest the said application. The appellant opposed the application.

The appellant tendered a written submission before the hearing of the application contending that the summary procedure under section 305 of the Companies Act (Cap. 185, 1970 Edn. now Cap. 50, 1985 Edn.) was "not the proper procedure through which to vindicate such a claim as this." During the hearing, the preliminary question as to the appropriateness of the summary procedure was argued but the learned judge did not, in his written judgment, deal with that question (see [1985] 1 M.L.J. 411).

In this appeal, the question was whether the learned judge erred in law in failing to hold that in the circumstances of the appellant's case the summary procedure under section 305 was not the proper procedure and in failing to order pleadings, discovery and a full trial on the merits of the respondent's claim before the appellant could be found liable.

Held: (1) it is well settled that, although it would only be in extra-ordinary circumstances that the Court of Appeal would interfere with the discretionary decision of the judge in the conduct of the business in his own Court, the Court of Appeal would interfere if clearly satisfied that the decision was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or other of the parties;

(2) the learned judge's conclusion that "there is irrefutable evidence that after 1976 it was (the appellant) who as executive director of the company was mainly responsible for the management of the Company" was plainly wrong and could not be supported on any view of all the material before the Court below;

(3) there was no evidence to support the learned judge's finding that the appellant had as executive director of the Company full and effective control of all Panamanian ships managed by the Company;

(4) justice required that an opportunity must be given to the appellant at a full trial to put forward his defence and the failure to afford him that opportunity had resulted in an injustice to the appellant or a miscarriage of justice;

(5) the only remedy was to order that pursuant to Rules of Supreme Court Order 28 rule 8(1) these proceedings continue as if they had been begun by a writ of summons and the parties hereto deliver pleadings in accordance with Order 18 and that the Order made by the learned judge should be set aside.

Cases referred to:

(1) *Evans* v. *Bartlam* [1937] A.C. 473.
(2) *Ratnam* v. *Cumarasamy* [1965] 1 M.L.J. 228, 229.
(3) *Hadmor Productions* v. *Hamilton* [1983] 1 A.C. 191.

COURT OF APPEAL.

Peter Julian Millett Q.C. (*Eddy Teng Jong Pu* with him) for the appellant.

James Robert Reid Q.C. (*Joseph Grimberg* and *Muthu Arusu s/o Murugayair* with him) for the respondent.

Cur. Adv. Vult.

Wee Chong Jin C.J. (delivering the Judgment of the Court): In this appeal the respondent is the Official Receiver and Liquidator of Kie Hock Shipping (1971) Pte. Ltd. ("the Company") a private exempt company which was compulsorily wound up on May 27, 1978. The appellant, Tay Beng Chuan, was one of five directors and held 2% of the issued shares of the company. Another director was Tay Hock Gwan who was the Permanent Managing Director and the other directors were a wife, a son, and a daughter of Tay Hock Gwan. The appellant is a nephew of Tay Hock Gwan who together with members of his family owned the other 98% of the issued shares of the company which carried on a shipping business.

After the winding up order the Minister of Finance in exercise of his powers under sections 195 and 196 of the Companies Act ("the Act") appointed two Inspectors to investigate the affairs of the Company. Their terms of reference, *inter alia*, were:

"(B)(2) To inquire specifically into the following matters:-

(i) Losses suffered through negligence or fraud on the part of the officers;

(v) Any dealings which may be in breach of fiduciary duty required of the officers;

(vii) Any failure on the part of the officers to act honestly and diligently;

(ix) Any inappropriate applications of the company's funds.

The Inspectors conducted a lengthy investigation during which they examined many witnesses including Tay Hock Gwan, the appellant and the other directors of the Company and on September 30, 1980 they submitted their Report ("The Inspectors' Report"). It would appear that, based on the Inspectors' Report, criminal proceedings were instituted in early 1981 by the Public Prosecutor against Tay Hock Gwan and the appellant. Five charges for offences under the Act were preferred against the appellant, one of them being for "failing to cause action to be taken by the (Company) to recover debts owed to (the Company) by twelve companies incorporated in the Republic of Panama ... which on December 30,. 1977, amounted to $10,291,000.00 and which were allowed to accumulate to $11,551,000.00 by May 26, 1978, and thereby commit a breach of duty under section 132(1) of the Act to at all times use reasonable diligence in the discharge of the appellant's duty as a director of the Company." The appellant was fined $1,500 when on September 29, 1981, he pleaded guilty to that charge.

On October 15, 1981, the respondent as liquidator of the Company took out an application by way of a Summons-in-Chambers in the Winding-Up proceedings against Tay Hock Gwan and the appel-

lant pursuant to section 305 of the Act seeking from the High Court the following orders:

"(1) A declaration that one Tay Hock Gwan and the Appellant had been guilty of misfeasance or breach of duty in relation to Kie Hock Shipping (1971) Pte. Ltd. ("the Company"):

(a) in failing between December 30, 1977 and May 26, 1978, to cause action to be taken by the Company to recover debts owed to it by twelve companies incorporated in the Republic of Panama, namely:

Compania Naviera Thompson SA
Africa Shipping Co. Ltd. Inc.
Gammewah Enterprises Ltd. SA
Tali Shipping Co. Ltd. SA
Compania De Navegacia Laiton SA
Holley Shipping Co. Ltd. SA
Keringo Shipping Co. Ltd. SA
Kadima Shipping Co. Ltd. SA
Benteng Enterprises Co. Ltd. SA
Sahaka Enterprises
Salama Shipping Ltd. SA
Gambella Enterprises Ltd. SA

(collectively "the Panamanian Companies") which on December 30, 1977 amounted to $10,291,000.00 and

(b) in allowing the said debts to accumulate such that by May 26, 1978 they totalled $11,551,000.00;

(2) An order that Tay Hock Gwan and the Appellant do jointly and severally pay to the respondent herein the sum of $11,551,000.00 being the total amount of the said unrecovered debts and interest thereon at 8% per annum from May 26, 1978 until payment or such sum by way of compensation in respect of the misfeasance or breach of duty as this Honourable Court thought just;"

The twelve Panamanian companies named in the application are the twelve Panamanian companies named in the criminal charge to which the appellant had pleaded guilty on September 29, 1981. Although the Inspectors' Report was not referred to or exhibited in the affidavit in support of the respondent's application affirmed by the Deputy Official Receiver, the affidavit was apparently based on the Inspectors' Report and in particular Part C which deals with 13 Panamanian companies which, according to the Inspectors, were incorporated or caused to be incorporated by Tay Hock Gwan "for the purpose of owning or operating various ships under the Panamanian flag" the object being "to take advantage of the absence of any statutory regulations governing the business or activities of Panamanian companies and the operation of ships sailing under the Panamanian flag" and thus permitting "Tay Hock Gwan to do what he liked with the Panamanian companies and their ships." That this is so can be seen from paragraphs 11 to 13 of the affidavit which reads:—

"11. It was therefore clear that by 1977, the Company was in critical financial difficulties. Despite this, the respondents Tay Hock Gwan and Tay Beng Chuan as managing director and executive director respectively of the Company took no action whatsoever to recover the enormous debts owed to it from the 12 Panamanian companies although by that year, the debts had amounted to $10,774,000/—. On the contrary, the respondent Tay Hock Gwan was at about that time actively disposing of the ships belonging to the Panamanian companies to his relatives and affiliated companies. The respondent Tay Beng Chuan was aware of this. No proceeds of the disposal of the ships were credited to the accounts of the Panamanian companies kept by the Company. To aggravate matters, the respondents further allowed the debts to accumulate such that by May 26, 1978, the date of the winding up order, they totalled $11,551,000/—.

12. The ships were the only assets of the Panamanian companies. In thus disposing of them without payment to the company, the respondent Tay Hock Gwan effectively deprived the Company of all possibility of recovering the debts owing by the Panamanian companies. In the Statement of Affairs filed by the respondent Tay Beng Chuan, all the Panamanian debts due to the Company were classified by him as irrecoverable on the basis that the Panamanian companies had no assets to which the Company could have recourse.

13. The loss of $11,551,000/— suffered by the Company as a result of the irrecoverability of the Panamanian debts was the single most important factor which accounted for the hopeless state of the Company's insolvency. The Company was finally wound up on May 26, 1978. To date, the claims filed by the Company's creditors in this winding up amount to about $24.3 million."

It would also appear from the Deputy Official Receiver's affidavit that the fact of the appellant's conviction on the charge of breach of duty under section 132(1) of the Act, in failing at all times to use reasonable diligence to cause action to be taken against the Panamanian companies to recover the huge debt collectively owed by them to the Company and to allow that debt to accumulate right up to the date of the compulsory winding-up order, was not relied on by the respondent in support of the application.

Tay Hock Gwan did not contest the application and an order in terms of Prayer (1) was made and he was further ordered to pay $11,551,000.00 (being the total indebtedness of the twelve Panamanian companies to the Company as at May 26, 1981) with interest by way of compensation to the Company. The appellant opposed the application and in his affidavit dated April 28, 1982, raised several defences and also a procedural point in the concluding paragraph of his affidavit which reads:

"12. In the premises, I pray that I be given leave to defend

the action. As the matter is complicated both on facts and law, I am advised by my solicitors and do verily believe that detailed pleadings and particulars and discovery are necessary in order to enable me to defend the proceedings in my best interests."

One of the defences raised by the appellant in his affidavit is that "even if found in breach of duty, I would be able to ask the Court to excuse me under section 354 of the Companies Act on the ground that in the circumstances I had acted honestly and reasonably."

The respondent, on May 11, 1982, filed an affidavit in reply which is affirmed by the Deputy Official Receiver. In it the Inspectors' Report is referred to for the first time as also is the submission that the appellant had pleaded guilty to the charge of breaching the same duty as alleged in the present application and is thereby precluded from defending the present application.

The appellant also tendered a written submission before the hearing of the application contending that the summary procedure under section 305 of the Act was "not the proper procedure through which to vindicate such a claim as this." It would appear from the learned judge's notes that during the hearing the preliminary question as to the appropriateness of the summary procedure was argued but the learned judge did not, in his written judgment, deal with that question.

It is now raised by this appeal and the question is whether the learned judge erred in law in failing to hold that in the circumstances of the appellant's case the summary procedure under section 305 was not the proper procedure and in failing to order pleadings, discovery and a full trial on the merits of the respondent's claim before the appellant can be found liable. It is convenient at this stage to set out the relevant sections of the Act:

Section 305(1) reads:

"305.–(1) ... in the course of winding up it appears that any person who has ... been guilty of any misfeasance or breach of trust or duty in relation to the company, the Court may on the application of the liquidator ... examine into the conduct of such ... officer and compel him to repay or restore the money or property or any part thereof with interest at such rate as the Court thinks just or to contribute such sum to the assets of the company by way of compensation in respect of the ... misfeasance or breach of trust or duty as the Court thinks just."

Section 132(1) reads:

"132.–(1) A director shall at all times act honestly and use reasonable diligence in the discharge of the duties of his office."

Section 354(1) reads:

"354.–(1) If in any proceeding for negligence, default, breach of duty or breach of trust against a person to whom this section applies it appears to the court before which the proceedings are taken that he is or may be liable in respect thereof but that he has acted honestly and reasonably and that having regard to all the circumstances of the case including those connected with his appointment, he ought fairly to be excused for the negligence, default or breach the court may relieve him either wholly or partly from his liability on such terms as the court thinks fit."

Order 28 rule 8(1) of the Rules of Supreme Court reads:

"8.–(1) Where, in the case of a cause or matter begun by originating summons, it appears to the Court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause or matter had been begun by writ, it may order the proceedings to continue as if the cause or matter had been so begun and may, in particular, order that any affidavits shall stand as pleadings, with or without liberty to any of the parties to add thereto or to apply for particulars thereof."

It is well settled that, although it would only be in extraordinary circumstances that the Court of Appeal would interfere with the discretionary decision of the judge in the conduct of the business in his own Court, the Court of Appeal would interfere if clearly satisfied that the decision was wrong so as to defeat the rights of the parties altogether and would be an injustice to one or other of the parties.

In *Evans* v. *Bartlam*[1] Lord Wright at pages 486-7 said:

"But there is in that case no reference to or discussion of the duty or power of the Court of Appeal to review the general discretion of a judge in interlocutory matters, the extent of which has been illustrated by numerous cases before and since *Pollak's* case. It is clear that the Court of Appeal should not interfere with the discretion of a judge acting within his jurisdiction unless the Court is clearly satisfied that he was wrong. But the Court is not entitled simply to say that if the judge had jurisdiction and had all the facts before him, the Court of Appeal cannot review his order unless he is shown to have applied a wrong principle. The Court must if necessary examine anew the relevant facts and circumstances in order to exercise a discretion by way of review which may reverse or vary the order. Otherwise in interlocutory matters the judge might be regarded as independent of supervision. Yet an interlocutory order of the judge may often be of decisive importance on the final issue of the case, and one which requires a careful examination by the Court of Appeal. Thus in *Gardner* v. *Jay*, Bowen L.J. in discussing the discretion of the judge as regards mode of trial says: 'That discretion, like other judicial discretions, must be exercised according to common sense and according to justice, and if there is a miscarriage in the exercise of it it will be reviewed.'

But there are many cases in the books where it has been held that exercise of the discretion by the judge was not justified on the facts. ... Thus in *Maxwell* v. *Keun* the Court of Appeal reversed the trial judge's order refusing to the plaintiff an adjournment. That was a pure matter of discretion on the facts. Atkin L.J. said: 'I quite agree the Court of Appeal ought to be very slow indeed to interfere with the discretion of the learned judge on such a question as an adjournment of a trial, and it very seldom does so; but, on the other hand, if it appears that the result of the order made below is to defeat the rights of the parties altogether, and to do that which the Court of Appeal is satisfied would be an injustice to one or other of the parties, then the Court has power to review such an order, and it is, to my mind, its duty to do so.'"

Lord Atkin at pages 480-481 said:

"Appellate jurisdiction is always statutory: There is in the statute no restrictions on the jurisdiction of the Court of Appeal; and while the appellate Court in the exercise of its appellate power is no doubt entirely justified in saying that normally it will not interfere with the exercise of the judge's discretion except on grounds of law, yet if it sees that on other grounds the decision will result in injustice being done it has both the power and the duty to remedy it."

The Privy Council in *Ratnam* v. *Cumarasamy*[2] at page 229 said:

"The principles upon which a court will act in reviewing the discretion exercised by a lower court are well settled. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co.* v. *Johnston* per Lord Wright at 148). The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans* v. *Bartlam*)."

A more recent authority that we need refer to is *Hadmor Productions* v. *Hamilton*[3] which was an appeal arising out of the refusal of the High Court to grant interlocutory injunctions in the same terms as those claimed in the writ. Lord Diplock in his speech said at page 220:

"... it is I think appropriate to remind your Lordships of the limited function of an appellate court in an appeal of this kind. An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordships' House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only. It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunction may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

Accordingly, on this question we have to examine anew the relevant facts and circumstances and, if the appellant clearly satisfies us that the learned judge was wrong in the exercise of his discretion in hearing the application of the respondent summarily instead of ordering pleadings, discovery and a full trial on the merits and his discretion has resulted in an injustice to the appellant or a miscarriage of justice, then it is the duty of this Court to exercise its discretion by way of review to remedy the injustice.

The only substantial evidence before the learned judge was the Inspectors' Report which contains, *inter alia*, their findings of fact based on the evidence, oral and documentary before them. They made, in our opinion, two crucial findings. These were:

(1) "121 – All the related corporations and the affiliated companies were controlled by Tay Hock Gwan up to the winding up of the Company. He was responsible for incorporating every one of them and he also appeared to have paid for the entire issued share capitals of these companies and caused some of these shares to be issued to various members of his family and Tay Beng Chuan. In some instances, evidence was given by some of these shareholders that they were not even aware that the shares had been registered in their names. *We have no doubt that the control exercised by Tay Hock Gwan over the Company and these related corporations and affiliated companies was complete and absolute.* In the words of Tay Beng Chuan, Tay Hock Gwan was 'the overall boss'."

(2) "126 – *Tay Hock Gwan had complete and absolute control over the management of all the companies within the group and he was the principal party responsible for the disposals of the group's assets. Therefore the collapse of the group and the dissipation of its assets must rest squarely on his shoulders.* As the principal director of the Company, Tay Hock Gwan has not acted in the interest of the Company and he has failed to discharge his duties and obligations to the Company." (The emphasis is ours)

Contrary to the crucial findings of the Inspectors, the learned judge (at page 13 of his judgment) came to the conclusion that "there is irrefutable evidence that after 1976 it was (the appellant) who as executive director of the Company was mainly responsible for the management of the Company." In our judgment that finding was plainly wrong and cannot be supported on any view of all the material before the Court below.

Another finding of fact by the learned judge which in our judgment is contrary to the Inspectors' finding is that the appellant had as executive director of the Company full and effective control of all Panamanian ships managed by the company. He based that finding on the evidence given by Tay Hock Gwan to the Inspectors as appears from a passage in his judgment which reads:

"Secondly, though the (appellant) was not a director or shareholder of the Panamanian Companies, as executive director in charge of operations of the Company, he had full and effective control of all Panamanian ships managed by the Company. That this is so is borne out in the evidence of (Tay Hock Gwan) to the Inspectors.

Q. But you were the M.D. (Managing Director) you should know?

A. Yes, I was the M.D. but I trusted others to manage the Companies' affairs. They were educated in U.K. and so I trusted them and depended on them."

In our judgment there was no evidence to support this finding. This finding is also not borne out by the evidence of Tay Hock Gwan which was that he trusted and depended on others who were U.K. educated to manage the Companies' affairs. It was not Tay Hock Gwan's evidence that he trusted and depended on the appellant solely. At all events the Inspectors seemed suspicious of the credibility of Tay Hock Gwan as can be seen at Para. 124 of their Report where they said:

"Our difficulties were exacerbated by the fact that the Singapore company ... was already in liquidation and its directors were not forthcoming or candid in their evidence."

The decision of the learned judge to hear the section 305 application summarily resulted in the appellant being ordered, jointly and severally with Tay Hock Gwan to pay to the Official Receiver as liquidator of the Company the enormous sum of $11,551,000.00 being the total unrecovered debts and interest thereon of the Company the control of which the Inspectors had no doubt was completely and absolutely exercised by Tay. Hock Gwan and who had complete and absolute control over the management of all the companies within the group and on whose shoulders must rest squarely the collapse of the group and the dissipation of its assets. Having regard to these findings of the Inspectors we are driven to the conclusion that justice requires that an opportunity must be given to the appellant at a full trial to put forward his defence and the failure to afford him that opportunity has resulted in an injustice to the appellant or a miscarriage of justice.

It is to be observed that section 305 gives the Court a discretion if the appellant is found by the Court to be guilty of any misfeasance or breach of trust or duty in relation to the Company to, *inter alia*, order him ... to contribute such sum to the assets of the Company by way of compensation ... as the Court thinks just." The learned judge, for reasons we are unable to discover, ordered the appellant by way of compensation to pay the total unrecovered debts of the Company together with interest thereon and in so doing we are of the opinion that the learned judge's decision was so plainly wrong that he must have exercised his discretion wrongly.

In all the circumstances we are of the opinion that the only remedy is to order that pursuant to Rules of Supreme Court Order 28 rule 8(1) these proceedings continue as if they had been begun by a writ of summons and the parties hereto deliver pleadings in accordance with Order 18 and that the order made by the learned judge should be set aside.

The appellant is to have the costs of the appeal. The costs in the court below is to abide by the result of the fresh hearing which should be dealt with by another judge.

Order accordingly.

Solicitors: *Haridass Ho & Partners; Drew & Napier.*